Reg. No. GR/RNP/GOA/32

RNI No. GOAENG/2002/6410

Panaji, 11th April, 2008 (Chaitra 22, 1930)

SERIES II No. 2

OFFICIAL GAZETTE

GOVERNMENT OF GOA

SUPPLEMENT

GOVERNMENT OF GOA

Department of Labour

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Notification

No. 28/18/2007-LAB/932

The following Award passed by the Industrial Tribunal of Goa, at Panaji-Goa on 14-9-2007 in reference No. IT/50/2001 is hereby published as required by Section 17 of the Industrial Disputes Act, 1947 (Central Act 14 of 1947).

By order and in the name of the Governor of Goa.

Hanumant T. Toraskar, Under Secretary (Labour).

Porvorim, 8th October, 2007.

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IN THE INDUSTRIAL TRIBUNAL-CUM-
-LABOUR-COURT-I AT PANAJI

(Before Dilip K. Gaikwad, Hon'ble Presiding Officer)

Case No. IT/50/2001

Haresh Kaulekar,
Dongri, Mandur,
Dhakte Bhatt,
P. O. Neura, Ilhas-Goa. — Workman/Party I

V/s

M/s. Premier Builders,
301, Unitech City Centre,
Panaji, Goa. — Employer/Party II

Workman/Party I is represented by Adv. P. J. Kamat.

Employer/Party II is represented by Adv. P. Chawdikar.

AWARD

(Passed on this 14th day of September, 2007)

This is a reference under Section 10(1) (d) of the Industrial Disputes Act, 1947 (hereinafter in short referred to as the said Act, 1947).

1. Facts of present reference, stated in brief, are as follows:

The Government of Goa in exercise of powers conferred on it by Section 10(1) (d) of the said Act, 1947, under order dated 21-8-2001 has referred to this Industrial Tribunal following dispute for adjudication:

I. Whether the action of the management of M/s. Premiere Builders, Panaji-Goa, in refusing employment to Shri Haresh G. Kaulekar, Peon, w.e.f. 3-7-2002 is legal and justified?

II. If not, to what relief the workman is entitled?

2. In response to notices, both parties put their appearance in this Industrial Tribunal. The Party I presented his claim statement on 11-10-2001 at Exb. 3. It appears from the claim statement that the Party II-Employer is carrying on business of construction of flats and buildings etc. The Party I was working as a Peon in establishment of the Party II w.e.f. 17-10-1988. the Party II refused employment to the Party I and thereby terminated service of the Party I w.e.f. 3-7-2000 afternoon. The Party I at the time of termination of his service was getting wages of Rs. 2,735/- p. m. The Party II terminated service of the Party I without issuing termination letter and also without making compliance with provisions contained in Sec. 25-F of the said Act, 1947. The Party I raised a dispute before the Labour Commissioner, Panaji, who in turn, called both the parties for conciliation. The Party II in its reply dated 12-10-2000 reiterated before the Assistant Labour Commissioner, Panaji, that it does not wish to continue the Party I in its establishment. The conciliation proceeding held by the Asstt. Labour Commissioner ended in failure, as a result, the Government of Goa has

referred the dispute to this Industrial Tribunal for adjudication, as stated earlier.

3. The Party I by presenting the claim statement claims that, termination of his service by the Party II is illegal and unjustified. He has prayed for reinstatement in service of the Party II with full back wages, with continuity in service and with all other consequential benefits.

4. The Party II resisted the claim statement by filing its written statement on 22-7-2002 at Exb. 5. It appears from the written statement that the Party II is not an "industry" within the meaning of provisions of the said Act, 1947, and therefore, the reference is not maintainable. The Party I has committed several acts of misconducts for which he was given warnings from time to time. He was remaining absent without getting leave sanctioned or without prior approval of the Party II. He was irregular in attending his duty which has caused inconvenience and substantial loss to the Party II and which is difficult to compute in terms of money. Inspite of giving sufficient opportunities the Party I did not make improvements in his behaviour, therefore, the Party II has no option but to refuse employment to the Party I. Termination of service of the Party I does not amount to retrenchment as the termination is not by way of punishment. Action taken by the Party II in refusing employment to the Party I is legal and justified. Therefore, the Party II has entreated to reject the reference.

5. The Party I submitted his rejoinder on 23-8-2002 at Exb. 8. All contentions which are raised by the Party II in its written statement and which are adverse to his interest are denied by him in the rejoinder. He further asserted that the Party II cannot refuse employment to him on the ground of alleged acts of misconducts. It was necessary for the Party II to conduct an inquiry against him before taking such action.

6. On basis of pleadings of both parties, the then learned Presiding Officer framed issues on 7-1-2003 at Exb. 11. The issues are recast by me at Exb. 19. The parties did not lead evidence after recasting of the issues. The recast issues are as follows:-

1. Whether the Party II is an "industry" as defined under Sec. 2(j) of the I. D. Act, 1947?
2. Whether the reference is maintainable?
3. Does the Party I prove that refusal of employment by the Party II w.e.f. 3-7-2000 amounts to retrenchment?
4. Whether action of the Party II in refusing employment to the Party I w.e.f. 3-7-2000 is legal and justified?
5. Whether the Party I is entitled to any relief?
6. What Award?

7. My findings on the above issues are as follows:-

1. In the affirmative.
2. In the affirmative.
3. In the affirmative.
4. In the negative.
5. In the affirmative.
6. As per final order below.

REASONS

8. *Issue No. 1:* Since the Party I has raised plea in its written statement that it is not an "industry", it becomes necessary to have reference of provision contained in Sec. 2(j) of the said Act, 1947 and which defines "industry". This section lays down that:

> *"Industry" means any business, trade, undertaking, manufacture or calling of employers and includes any calling service, employment, handicraft or industrial occupation or avocation of workmen".*

9. The Party II is running business of construction of flats and buildings etc. This fact is not specifically denied by the Party II in its written statement. Such activity certainly comes under the scope of definition of "industry" and which is provided under Sec. 2(j) of the said Act, 1947. I, therefore, answer the issue in affirmative.

10. *Issue No. 2:* The Party II raised plea in its written statement that it is not an "industry" and therefore, the reference is not maintainable. To put it in other words, the Party II has challenged maintainability of the reference on the ground that it is not an "industry". It is proved that the Party II is "industry" as defined under Sec. 2(j) of the said Act, 1947. Plea raised by the Party II regarding maintainability of the reference is devoid of merits.

11. The Party I is a workman as defined under Sec. 2(s) of the said Act, 1947. There is relationship of employee and employer between the Party I and the Party II at the time of termination of service of the Party I. Dispute raised by the Party I is connected with his employment or non-employment. It is an industrial dispute as defined under Sec. 2(k) of the said Act, 1947. In view of this position and since the Party II is an "industry" as stated earlier, it will have to be held that the reference is maintainable. My answer to the issue is in affirmative.

12. *Issue No. 3:* The Party I was appointed as a peon in establishment of the Party II w.e.f. 17-10-1988. Xerox copy of his appointment letter is at Exb. W-1. The Party II refused employment to him w.e.f. 3-7-2000

(afternoon). This fact is admitted by the Party II itself in its written statement. Sec. 2(oo) of the said Act, 1947, defines retrenchment as follows:-

"Retrenchment" means the termination by the employer of the service of a workman for any reason whatsoever, otherwise, than as a punishment inflicted by way of disciplinary action, but does not include-

(a) voluntary retirement of the workman; or

(b) retirement of the workman on reaching the age of superannuation if the contract of employment between the employer and the workman concerned contains a stipulation in that behalf; or

(bb) termination of the service of the workman as a result of non-renewal of the contract of employment between the employer and the workman concerned on its expiry or of such contract being terminated under a stipulation in that behalf contained therein; or

(c) termination of the service of a workman on the ground of continued ill-health.

13. Termination of service of Party I does not come under any of the clauses (a) to (c) reproduced above. It will have to be seen as to whether the refusal to employment which amounts to termination of service of Party I by the Party II is otherwise than a punishment inflicted by way of disciplinary action. The main controversy centres round the true meaning to be assigned to the expression "otherwise than as a punishment inflicted by way of disciplinary action". Bare reading of the definition clause makes it manifest that, if the employer takes a disciplinary action against the employee and terminates his services for a misconduct as a major of punishment, the termination would not fall within the definition of retrenchment.

14. The Hon'ble Supreme Court held in case of D. K. Yadav, Petitioner v/s J.M.A. Industries, respondent, reported in 1993 II CLR 116 and which is placed before me by learned advocate of Party I that, definition of retrenchment in Sec. f. 2(oo) is comprehensive one intended to cover any action of the management to put an end to the employment of an employee for any reason whatsoever. In the present case, the Party II has refused employment w.e.f. 2-7-2000 to the Party I due to his past acts of misconducts. It appears from the xerox copy produced at Exb. E-1 that the Party I was negligent and he had committed misbehaviour in respect of work entrusted to him. Therefore, the Party II issued warning to the Party I that such misbehaviour will not be tolerated in future, and that, in the event of any future misbehaviour, his services will be immediately terminated. Xerox copy produced at Exb. E-2 shows that on 13-1-1997, the Party I left office of the Party II without prior sanction of his leave which amounts to gross indiscipline. He did not report to his duty on 14-1-1997. He remained absent without prior intimation to the Party II, therefore, the Party II issued warning to the Party I that such behaviour will not be tolerated, and that, strict disciplinary action will be taken against him if such things are repeated in future. Inspite of giving several instructions and of issuance of memos, the Party I was habitually reporting late to the office. Therefore, the Party II called upon the Party I to give an undertaking in writing that he will not be late to the office, and will not remain absent without intimation. Xerox copy of this notice dated 26-3-1998 is at Exb. E-4. It appears that in response to this notice the Party I gave undertaking on the very day that he will report to his duty at 8.30 a.m. sharp on everyday and to discharge his duties sincerely. Xerox copy of the undertaking is at Exb. E-3. On 17-7-1999, the Party II informed to the Party I that he has been reporting to his duty late in the morning session, and directed the Party I to refrain from such misconduct. Xerox copy of the letter is at Exb. E-5. On 13-10-1999 the Party I informed the Party II that due to his illness, he was unable to attend his duties regularly. He prayed for apology and gave an undertaking that he will not repeat such irregularity in future. Xerox copy of the undertaking is at Exb. E-6. On 21-10-99, the Party II informed the Party I that he continued to remain absent without prior sanction of leave from its management. He is given warning that such repetition will not be tolerated in future, and that, strict disciplinary action will be taken against him and his services will be terminated. Xerox copy of the warning is at Exb. E-7. It appears from warning given to the Party I on 6-3-2000 that he was absent from duty between 29-2-2000 to 6-3-2000 without intimation to the Party II. It was unauthorized absence. The Party II gave warning to the Party I that, his absence in future without prior intimation to the office shall render his services to be terminated without any further notice. Xerox copy of the warning is at Exb. E-8. There is xerox copy at Exb. E-10, which speaks that the Party I gave an undertaking to report to his duty regularly on time, and that, he shall strictly obey his seniors. He has given further undertaking that he will not leave office premises without prior permission, and that, he will not remain absent without sanction of the leave.

15. Evidence of Dorothy Rebello who is the Administrative Manager of the Party II and which is in shape of affidavit (Exb. 13) supported by the above stated warning letters, makes it crystal clear that the Party I was committing acts of misconducts time and again, and that, inspite of giving sufficient opportunities by the Party II, he did not make improvements in his behaviour. All these acts of misconducts are prior to 3-7-2000 on which the Party II refused employment to the Party I. It is not the case of Party II that the Party I has committed misconducts on the date of refusal of employment. It necessarily follows that the Party II refused employment to the Party I because of his acts of misconducts which are committed in the past. The Party II did not taken disciplinary action against the Party I in respect of any of the past acts of misconducts. The Party II has refused employment and thereby terminated service of the Party I w.e.f. 3-7-2000 (a.n.)

without taking disciplinary action. Such refusal of employment which amounts to termination of service, falls within the definition of retrenchment provided under Sec. 2(oo) of the said Act, 1947. I agree with argument advanced in this regard by learned advocate of the Party I-Workman. I, therefore, answer the issue in the affirmative.

16. *Issue No. 4:* Learned Advocate appearing on behalf of the Party I argued that the Party II had given warnings to the Party I in respect of each and every act of misconduct alleged to have been committed by the Party I in the past. The Party II cannot take action of refusing employment to the Party I on basis of the same acts of misconducts. Therefore, according to him, action of the Party II in refusing employment to the Party I w.e.f. 3-7-2000 cannot be said to be legal and justified. In support of his argument, he relied upon decision given by the Hon'ble High Court of Bombay in case of Laxman Shriyan petitioner v/s Air India Limited, Bombay and others, respondents, reported in 2001 II CLR 444. In this reported case, the petitioner was an employee of Respondent No. 1 since before 1984. His service was terminated on the ground that he submitted bogus caste certificate with an intention to enjoy benefits for Scheduled Caste/Scheduled Tribe candidates. The order of termination passed on 29-2-97 was challenged under Writ Petition on the ground that the petitioner was already punished earlier for the same act and punishment is already implemented. The Hon'ble High Court of Bombay held that:

> *"the petitioner having been punished earlier for the same misconduct, it is not open to respondent, 12 years thereafter to impose further punishment of such drastic nature and as such, the impunged order is set aside.*

17. It appears from the facts of the above reported case that the Respondent No. 1 after issuing show cause notice against the petitioner and on receipt of explanation submitted by the petitioner, the Respondent No. 1 by order dated 13-11-1984, considering service record of the petitioner came to conclusion that the ends of justice would be met if his increment due on 1-9-84 was differed by six months. Subsequently presidential directive was issued to the effect that if verification reveals that claim of the petitioner that he belongs to SC/ST is false, the services will be terminated forthwith without assigning any further reasons. In pursuance of this directive, the Respondent No. 1 after twelve years of the earlier order dated 13-11-84 imposed further punishment of termination of service of the petitioner. These facts are clearly distinguishable from that of the present one. The Party II never issued shown cause notice and initiated disciplinary action against the Party I in respect of any of his acts of misconducts in past. What is done by the Party II is that, it has merely given warnings to the Party I in respect of such acts of misconducts. With respect, I am of the opinion that decision given by the Hon'ble High Court of Bombay in the reported case of Laxman Shriyan is not applicable to the present case. I hold that since there is no punishment by initiating departmental action against the Party I, argument advanced by the learned advocate of Party I is also not acceptable.

18. Learned advocate of the Party II pointed out in his argument that the Party II has refused employment to the Party I, only because of repeated acts of misconducts committed by the Party I. There is justification for such action taken by the Party II. Therefore, in his opinion, action taken by the Party II in refusing employment to the Party I can safely be held to be legal and justified. He relied upon decisions given by the Hon'ble High Court of Judicature at Bombay in case between Nazir Abdul Karim Shaikh and Pimpri, Chinchwad Municipal Transport Corporation and another, reported in 2000 (4) LNN 979, and by the Hon'ble High Court of Madhya Pradesh in case of Hindustan Vidyut Product Limited and another v/s Surendra Singh, son of Shri Hargyan Singh and another, reported in 2002 LLR 722.

19. It appears from facts of the reported case of Nazir Abdul Karim Shaikh that he was a conductor. He remained absent for 98 days without prior intimation and without sanction. He did not give reply to show cause notice issued by the Corporation. His services came to be terminated. Reference which was made came to be rejected by the Labour Court. The Respondent Corporation had adduced evidence before the Labour Court to justify its action. The petitioner was given an opportunity to lead his evidence. He filed pursis stating that he did not want to lead evidence in support of his claim. Evidence led by the Corporation had gone totally unchallenged. The petitioner did not prove his case of absence for illness. The Hon'ble High Court pleased to hold that award of the Labour Court, rejecting the reference was proper. Facts of this reported case are also different from that of the present one. With respect, I am of the opinion that decision from this reported case is not applicable to the present case.

20. Facts of the reported case of Hindustan Vidyut Product Ltd., and another show that, the Respondent employees had made application before the Labour Court for deleting the issue pertaining to inquiry, because, no inquiry was held before terminating the service and the termination of service was brought about without there being a finding of guilt. The Labour Court granted the application and deleted the issue. The Hon'ble High Court of Madhya Pradesh held that the Labour Court had rightly allowed the application realizing the error committed by the employer, facts of this reported case are also different and as such, the same are also not applicable to the present case. Learned advocate of the Party II did not produce anything on record to support his argument that refusal of employment without initiating departmental action in respect of acts of misconducts alleged to have been committed by the employee is legal and justified. The argument advanced by him is not convincing. I, therefore, do not agree with him.

21. Refusal of employment to the Party I is challenged by learned advocate of the Party I mainly on the ground that the Party II did not comply with provisions contained in Sec. 25(F) of the said Act, 1947. It is proved that, refusal of employment to the Party I is retrenchment as defined under Sec. 2(oo) of the said Act, 1947. Therefore, provisions of Sec 25(F) are certainly applicable. This section which is in respect of conditions precedent to retrenchment of workmen lays down that:-

"No workman employed in any industry who has been in continuous service for not less than one year under an employer shall be retrenched by that employer until:

(a) the workman has been given one month's notice in writing indicating the reasons for retrenchment and the period of notice has expired, or the workman has been paid in lieu of such notice, wages for the period of the notice.

(b) the workman has been paid at the time of retrenchment, compensation which shall be equivalent to fifteen day's average pay for every completed year of continuous service or any part thereof in excess of six months and;

(c) notice in the prescribed manner is served on the appropriate Government of such authority as may be specified by the appropriate Government by notification in the Official Gazette".

22. The Party II did not comply with any of the above provisions, especially with provisions contained in clauses (a) and (b). Only on this ground, I hold that refusal of employment to Party I by the Party II and which amounts to retrenchment is not legal and not justified. I, therefore, answer the issue in negative.

23. *Issue No. 5:* As per provision contained in Sec. 11-A of the said Act, 1947, if the Labour Court, Industrial Tribunal or National Tribunal as the case may be, is satisfied that the order of discharge, dismissal is not justified, it may by its award set aside order of discharge or dismissal and direct reinstatement of the workman on such terms and conditions if any as it thinks fit, or give such other relief to the workman including the award of any lesser punishment in lieu of discharge or dismissal as the circumstances of the case may require.

24. Learned advocate of the Party I argued that dismissal of Party I from service is illegal and unjustified. Therefore, according to him, in view of provisions contained in Sec. 11-A of the said Act, 1947, the Party I is entitled to reinstatement in service with full back wages, with continuity in service and with consequential benefits. He lied upon decisions given by Hon'ble High Court of Delhi in case between Allied Shipping and Packing Company Pvt. Ltd., and Secretary (Labour) and others, reported in 2005 (105) FLR 490.

25. In case of Allied Shipping and Packing Co. Pvt. Ltd., neither payment of retrenchment compensation at the time of order was made nor any inquiry was held before presuming the abandonment of service. Considering gap of nine years between order of reinstatement and joining of service by the workman, the Hon'ble High Court of Delhi modified award passed, to the extent of 50% of back wages with continuity of service.

26. Once it is held that dismissal of workman i.e. of the Party I from service is not legal and not justified, the Party I is entitled to reinstatement in service. The question which is highly debated by both learned advocate is as to whether the Party I is entitled to back wages with continuity in service and with consequential benefits. Learned advocate of the Party II pointed out in his argument that the Party I is running "Kalpana General Stores" near Shantadurga Mandir at Village Dongri, which is the native place of the Party I. Name of the wife of Party I is Kalpana. The Party I is the proprietor of the shop. It is the general stores in which the Party I is carrying business of selling agarbattis, soaps, fire-crackers, chocolates, shaving blades, toothpastes, washing powder and flowers etc., this will certainly go to show that the Party I is gaining income. Therefore, according to him, it will not be correct to award full back wages to the Party I, if the Party I is reinstated in service. As against this, learned advocate of the Party I submitted that though the Party I is running the general store, it cannot be said that the Party I is gainfully employed. Therefore, the Party I is entitled to back wages with continuity in service and with consequential benefits.

27. In case of Indiana Engineering Works (Bombay) Pvt. Ltd., petitioner v/s the Presiding Officer, Fifth Labour Court and others respondents, reported in 1995, II CLR 890 and which is relied upon by the learned advocate of Party II, it was conclusively shown by the petitioner that the Respondent No. 2 was gainfully employed in another company since after termination of his service by the petitioner. The Hon'ble High Court of Bombay observed that the dismissed workman also owes a duty to the industrial adjudicator to honestly disclose full particulars of the facts which are purely within his knowledge and that any attempt to mislead the Tribunal must surely be looked at askance.

28. The Hon'ble Supreme Court held in case of Kendriya Vidyalaya Sangathan and another v/s S. C. Sharma reported in 2005-II-LLJ-153 that initial burden was on the employee to prove that he was not gainfully employed.

29. In case of Rajinder Kumar Kindra appellant v/s Delhi Administration through Secretary (Labour) and others, respondents, reported in 1986-LAB-I.C.-374 =AIR-1984-SC-1805, employee was dismissed for misconduct. His dismissal was set aside and his reinstatement was ordered. He was maintaining his family, helping his father-in-law in his coal depot and was living with him

having no other source during forced absence from the service. The Hon'ble Supreme Court held that it was not gainful employment.

30. Learned advocate of the Party I argued that the Party I is doing business of selling agarbattis only in the said shop and that to in the village. Such type of business will have not gain income sufficient to maintain family. Therefore, in his opinion, it will not be correct to hold that the Party I is gainfully employed. Relying upon decisions given by the Hon'ble High Court of Bombay in case of Indiana Engineering Works (Bombay) Pvt. Ltd., and by the Hon'ble Supreme Court in case of Kendriya Vidyalaya Sanghatana and another, referred to above, it will have to be held that it was for the Party I to disclose full particulars about the business which he is running and the income which he is getting from the shop. Nothing such has been done by him. He is selling not only agarbattis but other articles also which are stated earlier. Therefore, submission made by learned advocate of Party I that the Party I is selling only agarbattis in the shop, is devoid of merits. Since the Party I is running the general store, he must be getting some income therefrom.

31. Though it is proved that the Party I is earning income by way of running the general stores, the more important fact which requires to be taken into consideration is that he has committed several acts of misconducts time and again before the Party II refused employment to him on 3-7-2000. Inspite of giving sufficient opportunities by the Party II, he did not make improvements in his behaviour. Only because the Party II did not initiate departmental action against the Party I and did not comply with mandatory provisions contained in Sec. 25-F of the said Act, 1947, he is getting benefit of reinstatement. Therefore, and mainly considering his past conduct, I hold that it will be fit in the circumstances if his reinstatement is ordered with 25% of the back wages and with continuity in service. I, therefore, hold that, he is entitled to reinstatement in service with the said monetary benefits. I answer the issue accordingly.

As a result of findings given to issues number 4 and 5, I proceed to adjudicate the dispute by passing order as follows:-

ORDER

1. It is hereby adjudicated that the action of the management of M/s. Premier Builders, Panaji Goa, (Party II) in refusing employment to Shri Haresh G. Kaulekar, Peon (Party I) w.e.f. 3-7-2000 is not legal and not justified.

2. It is hereby adjudicated that the Party I-Workman is entitled to reinstatement in service of the Party II with 25% of back wages w.e.f. 3-7-2000 and with continuity in service.

3. No order as to costs.

4. The Award be submitted to the Government of Goa as per provisions contained in Section 15 of the Industrial Disputes Act, 1947.

Sd/-
(Dilip K. Gaikwad),
Presiding Officer,
Industrial Tribunal,
-cum-Labour Court-I.

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Notification

No. 28/18/2007-LAB/1002

The following Award passed by the Industrial Tribunal of Goa, at Panaji-Goa on 6-9-2007 in reference No. IT/64/2002 is hereby published as required by Section 17 of the Industrial Disputes Act, 1947 (Central Act 14 of 1947).

By order and in the name of the Governor of Goa.

Hanumant T. Toraskar, Under Secretary (Labour).

Porvorim, 16th October, 2007.

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IN THE INDUSTRIAL TRIBUNAL-CUM-LABOUR COURT-I AT PANAJI

(Before Dilip K. Gaikwad, Presiding Officer)

Case No. IT/64/2002

Workman,
Rep. by All Goa General Employees Union,
P. O. Box No. 90,
Vasco da Gama. ... Workman/Party I

V/s

M/s. Praveena Industries,
Bansai, Kakoda,
Curchorem-Goa. ... Employer/Party II

Workman/Party I is represented by Shri P. Gaonkar.
Employer/Party II is represented by Adv. G. B. Kamat.

AWARD

(Passed on this 6th day of September, 2007)

This is a reference under Section 10(1)(d) of the Industrial Disputes Act, 1947 (hereinafter in short referred to as the said Act, 1947).

1. Facts giving rise to present reference, stated in brief, are as follows:

The Government of Goa in exercise of powers conferred on it by Section 10(1)(d) of the said Act, 1947, under order dated 1-10-2002, has referred to this Industrial Tribunal following dispute for adjudication:

(i) Whether the action of the management of M/s. Praveena Industries in reverting Shri Shashikant Adel, from the post of Fabricator/ /Welder to Helper w.e.f. 1-2-2002 is legal and justified?

(ii) If not, to what relief the workman is entitled to?

2. In response to notices both parties put their appearance in this Industrial Tribunal. The Party I presented his claim statement on 13-12-2002 at Exb. 5. It appears from claim statement that the Party II of which one Anthony Mendonca is a Proprietor, is an Industrial Establishment engaged in machining work having speciality in housing and drum cutting, welding and fabrication, gas cutting and welding, earth-moving machines and in body building etc. The Party I was appointed as Fabricator/Welder in establishment of the Party II w. e. f. 10-6-1996. He was working in the same capacity till 31-12-2001. His last drawn wages were Rs. 2,700/- p. m. On 11-12-2001, he was given work of preparing goods truck bearing No. GA-02-T-7556 belonging to one S. G. Pathkar. At about 5.00 p. m., he entered into the cabin of the truck to remove wire connection from battery because it was not possible to do welding work without getting such removal. When he was removing the wire, the goods truck moved forward as a result the goods truck sustained minor damages. He was not responsible for the accident. Even then, the Party II issued show cause notice against him on 14-12-2001. He gave a reply to the show cause notice on 18-12-2001. The Party II by appointing Adv. G. B. Kamat held inquiry without issuing chargesheet against him. The Inquiry Officer recorded the statements of witnesses behind his back in office of the Party II. The Inquiry Officer completed inquiry within an hour. He was neither given sufficient opportunity during the inquiry nor he was allowed to take assistance of any person to represent his case. The inquiry held against him is not proper and fair and the same is against principles of natural justice. The Party II under its letter dated 22-1-2001 imposed upon him punishment of his demotion from the post of Fabricator/Welder to the post of Helper. The Party II reduced his monthly salary to daily wages @ Rs. 60/- p. m. which are minimum wages fixed by the State Government. The punishment imposed upon him is illegal, unjustified and bad in law. On 26-1-2002, he requested the Party II either to withdraw the punishment or to grant him leave for a period of six months and then to allow him to join his original post of Fabricator/Welder. The Party II did not consider his request. He raised a dispute under letter dated 6-2-2002 before Deputy Labour Commissioner, Margao, who in turn, called upon both the parties for discussions. The Party II did not give response, as a result, conciliation failed. Thereafter, the Government of Goa has referred the dispute to this Industrial Tribunal for adjudication as stated earlier.

3. The Party I by presenting the claim statement has prayed for declaration that his demotion to the post of Helper on daily wages @ Rs. 60/- p. m. is illegal, unjustified and bad in law, and for direction to the Party II to reinstate him in service on the original post of Fabricator/Welder on the same monthly wages with full back wages and with continuity in service.

4. The Party II filed its written statement on 13-1-2003 at Exb. 6. According to the Party II, the present dispute is not connected or is not arising out of discharge, dismissal, retrenchment or termination of the workman. It was necessary to espouse the dispute either by Union of the workmen or by substantial number of the workmen or by General Union representing substantial number of workmen working in its establishment. All Goa General Employees' Union raised dispute on behalf of the Party I before the Deputy Labour Commissioner, Margao. Employees including the Party I, working in its establishment are not members of the All Goa General Employees Union. The Party II joined this Union after he came to be demoted to the post of Helper. The All Goa General Employees' Union has no *locus standi* to espouse dispute on behalf of the Party I. There is no "industrial dispute" within the meaning of Sec. 2(k) of the said Act, 1947.

5. Further, it appears from the written statement that on 11-12-2001 at about 5.00 p. m., the Party I while he was on duty negligently operated the goods truck bearing Registration No. GA-02-T-7556 owned by S. G. Pathkar which was brought there for repairs. As a result, the goods truck dashed against the wall and roof of the factory-establishment. The Party I at the time of operating the truck was not holding driving licence. Due to this negligent act on part of the Party I, the truck was damaged. The Party II is constrained to bear the loss occasioned by the act of the Party I. On 14-12-2001, the Party II issued a letter against the Party I by making allegations of misconduct of causing damages/loss to the employer and to the third party. Explanation given by the Party I was not satisfactory. Therefore, the Party II held inquiry into the allegations levelled against the Party I. The Inquiry Officer conducted the inquiry as per the procedure. The inquiry is conducted in a fair and proper manner. He concluded that the charge of causing damages/loss to the employer and third party levelled against the Party I is proved. The Party II after giving sufficient opportunity to the Party I to submit explanation took lenient view, and imposed upon him, punishment of demotion to the lower grade. The punishment is legal and justified. Total loss caused due to the said negligent act on part of the Party I was amounting to Rs. 8,850/-. The Party II decided to deduct a sum of Rs. 100/- p. m. from wages payable to the Party I commencing from February, 2002 to January, 2003 for a period of 12 months, coming to a total of Rs. 1,200/- only. The Party I after his request for leave was rejected, started remaining absent w. e. f. 1-2-2002. Still he is absent from his duty. He is working with M/s. G. K. Industries situated at Kakoda, Curtorim Goa, from the month of February, 2002. On these and the above grounds, the Party II has requested to turn down the prayers made by the Party I in his claim statement.

6. The Party I submitted his Rejoinder on 3-2-2003 at Exb. 7. According to him, the All Goa General Employees' Union which is a registered union, had raised a dispute on his behalf before the competent authority. It is not necessary to sign the claim statement on behalf of the Union who had raised the dispute. Even though the dispute is raised by the Union before the competent authority, there is no bar to sign the claim statement by the concerned workman. There is an "industrial dispute" within the meaning of section 2(k) of the said Act, 1947. In this reply, he further denied all contentions which are raised by the Party II in its written statement and which are adverse to his interest. He reiterated that he is entitled to the prayers made in the claim statement.

7. On basis of pleadings of both the parties, the then learned Presiding Officer framed the issues on 20-2-2003 at Exb. 8. The issues are recast by me at Exb. 12. The recast issues are as follows:-

1. Whether the All Goa General Employees' Union has the locus standi to espouse the dispute on behalf of the Workman/Party I.
2. Whether the inquiry held against the Workman/ /Party I is not fair and proper?
3. Whether the action of the Party II in reverting the workman/Party I from post of Fabricator/ /Welder to the post of Helper w. e. f. 1-2-2002 is legal and justified?
4. Whether there is an "industrial dispute" within the meaning of Section 2(k) of the I. D. Act, 1947?
5. Whether the Party I is entitled to reliefs as prayed for?
6. What Award?

8. My findings on the above issues are as follows:–

1. In the affirmative
2. In the affirmative
3. In the negative
4. In the affirmative
5. In the affirmative
6. As per final order

REASONS

9. *Issue No. 1:* Evidence of Party I is at Exb. 11. He was employed as a Fabricator/Welder in establishment of the Party II w. e. f. 10-6-1996. Xerox copy of his appointment letter is at Exb. W-1. Since then, he was working on the post of Fabricator/Welder in establishment of the Party II. On 14-12-2001, the Party II issued letter informing him that on 11-12-2001 at about 5.00 p. m. when he was working in its establishment, he operated a truck bearing registration No. GA-02-T-7556 owned by S. G. Pathkar and which was brought for repairs, as a result, the truck dashed against the wall and roof of the factory establishment and caused damage to the roof and wall as well as to bumper and front side of the truck, that, he operated the truck without holding valid driving license, and that, the damages caused to the roof and wall and also to the truck are amounting to Rs. 8,850/- in total. Under this letter, the Party II called upon the applicant to show cause and to explain within three days of receipt of the show cause notice as to why he should not be dismissed from service for operating the truck without valid license and for causing the damage/loss to the employer and to third party. Xerox copy of the show cause notice is at Exb. E-1 colly. Xerox copy of reply given by the applicant on 18-12-2001 to this show cause notice is at page No. 3 of Exb. E-1, colly. The Party II did not find explanation submitted under the reply by the Party II, satisfactory. Therefore, the Party II by making appointment of Adv. G. B. Kamat held departmental inquiry into the allegations levelled against the Party I. The Inquiry Officer held the Party I guilty of the allegations. Thereafter, the Party II under its letter dated 22-1-2001 imposed upon the applicant punishment of his demotion from the post of Fabricator//Welder to the post of Helper w. e. f. 1-2-2002 on consolidated salary @ Rs. 60/- per day for a period of six months. Xerox copy of the letter dated 22-1-2002 is at Exb. W-2. Further, it appears from this letter that even though the total damages/loss caused due to act on the part of the Party I, was amounting to Rs. 8,850/- in total, the Party II decided to deduct a sum of Rs. 100/- p. m. from salary from wages of the Party I every month commencing from February, 2002 till January, 2003. The Party I by sending letter on 26-1-2002 requested the Party II to withdraw the letter dated 22-1-2002 (Exb. W-2), and to communicate its decision to him by 31-1-2002. The Party II did not consider request of the Party I. Therefore, the Party I approached the All Goa General Employees' Union (in short the said Union), who in turn raised dispute on behalf of the Party I before the Dy. Labour Commissioner, Margao. Conciliation proceeding held by the Dy. Labour Commissioner ended in failure, as a result, the dispute came to be referred to this Industrial Tribunal by the Government of Goa under its order dated 1-10-2002 for adjudication. The claim statement is filed not by the said Union, but by the Party I himself. He is not the member of the said Union.

10. Section 36(1)(c) of the said Act, 1947, provides that a workman who is a party to a dispute shall be entitled to be represented in any proceeding under this Act, where the worker is not a member of any trade union, by any member of the executive or other office bearer of any trade union connected with, or by any other workman employed in the industry in which the worker is employed and authorized in such manner as may be prescribed. Representative of the Party I argued that the Party I had approached the said union and therefore, the said union has *locus standi* to espouse the dispute on behalf of the Party I even though the Party I is not the member of the said Union. To substantiate his argument, he relied upon observations from para No. 3 of Judgement delivered by the Hon'ble High Court of Bombay in case of ANZ-Grindlays Bank v/s General Secretary, Grindlays Bank Employees Union & Others

reported in 2001 LLR 428. In this reported case the petitioner/Giant Multi National, appointed on 19-3-1990, a workman in the sub-staff (Peon) category. He continued till 30-7-94 continuously without any break. By an order dated 30-7-94, his employment was discontinued on the ground that he was no longer required as additional workman. Alongwith the said order of termination, he was given a pay order for a sum of Rs. 92,966.20 paise which included difference in wages payable to him and bonus. The amount of compensation payable under section 25F of the said Act, 1947, was also paid to him. He approached the respondent-union and the respondent-union questioned legality and propriety of termination order and espoused cause and raised an industrial dispute to get him reinstated in service with full back wages and continuity of service. The Tribunal held the action of the management-petitioner in terminating service of the workman as not legal and not justified and directed the mangement to reinstate him with continuity of service and full back wages. Learned Counsel for the Petitioner contended before the Hon'ble High Court that the workman was not the members of the respondent-union and though the industrial dispute was referred under Section 2(A) of the said Act, 1947, as an industrial dispute, the respondent-union had filed a statement of claim and its Secretary had signed the same, that, the respondent-union could not file the statement of claim as it was reference under Sec. 2-A as an individual dispute, that the concerned workman was not a member of the union and therefore, the union could not espouse his cause and could not have filed the statement of claim on behalf of the workman. Relevant portion of the observations made by the Hon'ble High Court and which are high-lighted in para No. 3 of the Judgement by representative of the Party I are as follows:

> *"The membership of a union is not a condition precedent to espouse an industrial dispute of a workman. The Union can espouse cause of even a non member, who approaches them for help. The Union must represent the case of workmen or employees like a representative union under the Bombay Industrial Relations Act, 1946, whether they are members or not. It is always in the interest of industrial relations that even an individual workman or an employee is represented by a union and that the cause is espoused by the Union and if the Union acts in the interest of the workmen."*

11. Learned Advocate of Party II in reply argued that none of the employees including the Party I working in establishment of the Party II is member of the said Union. It necessarily follows that the said Union does not represent substantial number of the workmen working in the establishment of Party II. Therefore, according to him, the said Union has no locus standi to espouse dispute on behalf of the Party I. In support of his arguments, he relied upon decisions given by the Hon'ble High Court of Delhi in case of Wings Wear Pvt. Ltd., v/s its workmen and others reported in 1989 (Vol. 74) FJR-333, by the Hon'ble High Court of Calcutta in case of Deepak Industries Ltd., and another appellants v/s State of West Bengal and Others respondents reported in 1975 LAB.I.C. 1153 and in case of Capital Limited v/s Eighth Industrial Tribunal, West Bengal & Others reported in 2006 (111) FLR-597.

12. In case of Wings Wear Pvt. ,Ltd., the petitioner had terminated services of six employees who had been temporarily engaged for a specific period in which an export order obtained by the petitioner was to be executed. The Assistant Industrial Tribunal, by its order held that the reference was valid as there existed atleast an industrial dispute between the workman and the petitioner as contemplated by Section 2-A of the said Act, 1947. It was contention by petitioner in challenging order passed by the Assistant Industrial Tribunal that, individual disputes of workmen regarding their not being permitted to join duty not having been sponsored by any union having any substantial number of members of the workmen of the petitioner, the reference treating the said dispute as an industrial dispute is invalid. It was evident that there were about 558 workmen of the petitioner. General Secretary of the Union admitted that there were only 40 workmen of the petitioner who were members of his union in the year 1969 in which year the petitioner terminated services of the six employees. The Hon'ble High Court of Delhi held in this case that:–

> *"the Union which has only microscopic number of the workmen as its members cannot sponsor any dispute arising between the workmen and the management and that, even an individual dispute of workmen can be sponsored by union which have substantial membership of the workmen of the particular industry".*

13. In case of Deepak Industries Ltd., and another, respondent-union, represented 174 employees of the appellants and who were dismissed from service. The appellants disputed locus standi of the union to represent the said 174 dismissed employees. The respondent-union did not produce any evidence to establish or to prove its authority in the reference to represent the dismissed employees. The Hon'ble High Court of Calcutta held in para No. 10 of the judgement that:

> *"In the absence of authorization by the individual workman or a number of workmen out of the same 174 dismissed workmen of the appellants or in the absence of any resolution of the members of the respondent-union to espouse the cause of the 174 dismissed workmen of the appellant in the reference, it cannot be said on the facts and in the circumstances of this case that the union had locus standi to represent the said 174 dismissed employees of the appellants".*

14. In case of Capital Ltd., the petitioner after holding inquiry into misconduct transferred the respondent workmen from Calcutta to Ahmedabad. The Union raised

dispute on behalf of the respondent workman. The dispute was referred for adjudication to industrial tribunal without any dispute being raised by the workman with the employer and without considering the locus of union to raise such a dispute representing the concerned workman. The Hon'ble High Court of Calcutta held that:

> *"though a dispute regarding a transfer of a workman when being raised by the union, may be referred to the Labour Court and/or industrial tribunal for adjudication, in as much as such a dispute falls under the residuary item No. 6 of the second schedule to the said Act, but still then, this Court is unable to maintain the said order of reference for the reasons aforesaid".*

15. In the present case, the dispute raised by the Party I is individual dispute. The said union who is not representative of any of the employees working on establishment of the Party II espoused dispute on behalf of the workman, i.e. the Party I before the Dy. Labour Commissioner. Facts of the present case are similar to the facts of the reported case of ANZ Grindlays Bank decided by the Hon'ble High Court of Bombay and which is reported in 2001 LLR 428. Decision given by the Hon'ble High Court of Bombay in this reported case is squarely applicable to the present case. Facts of the reported cases which are relied upon by the learned advocate of the Party II are different from that of the present one. With respect, I am of the opining that decision from these reported cases relied upon by the learned advocate of Party II are not applicable to the present case. Relying upon the decision given by the Hon'ble High Court of Bombay in case of ANZ Grindlays Bank alluded Supra, I agree with arguments advanced by the representative of the Party I. Argument advanced by learned advocate of the Party II must fail. I, therefore, answer the issue in affirmative.

16. *Issue No. 2:* The Party I was on duty on 11-12-2001 as Fabricator/Welder in establishment of the Party II. Departmental inquiry is held by inquiry officer Advocate G. B. Kamat, appointed by the Party II into the allegation of misconduct stated in show cause notice dated 14-12-2001 of which xerox copy is produced at Exb. E-1 colly and which is already referred to above. It is needless to reiterate in details the allegations of misconduct levelled against the Party I. The Inquiry Officer recorded the statement of four witnesses examined on behalf of the management of the Party II. These statements are alongwith list Exb. 3 colly. It appears from these statements that inspite of giving opportunity, the Party I did not cross examine the witnesses. The Inquiry Officer after conducting the inquiry submitted his report to the management of the Party II. The report which is dated 21-1-2002 is also alongwith list Exb. E-3, colly. He recorded finding that the Party I is found guilty of the charge of causing damages/loss to the employer and to third party.

17. The above inquiry held by the Party II is challenged by the representative of the Party I on the grounds that the Inquiry Officer is the same advocate who is representing the Party II in this reference, and as such it cannot be said that the inquiry office is neutral and independent officer. Further, according to him, the inquiry is held without issuing chargesheet against the Party I. No sufficient opportunity is given to the Party I to represent his case.

The procedure which is required to be followed, is not followed during the course of this inquiry. Therefore, in his opinion, the inquiry cannot be said to be fair and proper. He relied upon decision given by the Hon'ble Supreme Court in case of *(Sur Enamel and Stamping Works Ltd., v/s the workmen reported in SCLJ-Vol. 5-157.)*

18. Admittedly, inquiry into the allegation levelled against the Party I is conducted by Adv. G. B. Kamat as Inquiry Officer. He is the same advocate who is representing the Party II in this reference. Only because of this fact, it will not be correct to jump to conclusion that he was not neutral or independent at the time of holding the inquiry. I am unable to be in agreement with conclusion drawn against him by representative of the Party II.

19. The Inquiry Officer recorded statements of all the witness, four in number, and completed the inquiry on the very day. It appears from the report submitted by him and which is dated 21-1-2002 that he has recorded his statements of the witness in the presence of the Party I, and that, inspite of giving opportunity, the Party I did not cross examine the witnesses. If at all the Party I was not given opportunity, the best remedy which was available to him was to file an application with appropriate relief. Nothing such has been done by him. Not only that, after the inquiry was held, he did not make a grievance in respect thereof to the management of the Party II, stating that the Inquiry Officer did not give him opportunity. The grievance which is made by him under the statement of claim reveals to be after thought. Evidence of the Party I also does not speak even by way of inference that he was not given sufficient opportunity to cross examine the witnesses, that he wished to examine the witnesses including himself in his defence and that the inquiry officer did not give him fair opportunity for this purpose. In absence of evidence, it will not be correct to conclude that the Inquiry Officer did not give him sufficient opportunity in the inquiry held against him. I, therefore, do not agree with submissions made by his representative.

20. The Hon'ble Supreme Court held in case of *(Sur Enamel & Stamping Works Ltd.,)* that:–

> *"An inquiry cannot be said to be properly held unless (i) the employee proceeded against has been informed clearly of the charges levelled against him (ii) the witnesses are examined-ordinarily in the presence of the employee-in respect of the charge (iii) he is given a fair opportunity to examine the witnesses including himself in his defence if he so wishes on any relevant matter (iv) the inquiry officer records his finding with reasons for the same in his report".*

21. The Party II before holding inquiry did not issue chargesheet stating allegation of misconduct against the Party I. The inquiry which is held against the Party I is into the allegation of misconduct stated in the letter dated 14-12-2001 (Exb. E-1 colly) addressed to him. Such type of letter cannot be treated as chargesheet which is expected for initiation of the inquiry. I hold that the inquiry which is held without issuing chargesheet is not fair and proper. I agree with arguments advanced in this regard by representative of the Party I. My answer to this issue is in the affirmative.

22. *Issue No. 3:* On basis of finding recorded by inquiry officer that the Party I is guilty of charge of causing damages/loss to the employer and to third party, the Party II, after giving opportunity to the Party I imposed upon the Party I punishment of demotion from the post of Fabricator/Welder to the post of Helper under its letter dated 22-1-2001 produced alongwith list Exb. E-1, colly. The demotion is w. e. f. 1-2-2002.

23. Xerox copy of appointment letter produced at Exb. W-1 makes it clear that the Party I was directly recruited to the post of Fabricator/Welder. From the letter dated 22-1-2001 which is referred to above, it is apparent that he is reverted to the lower post i. e. to the post of Helper. The Hon'ble Surpeme Court held in case of Hussain Sasansaheb Kaladgi v/s State of Maharashtra reported in SCLJ-1984-1993-Vol. 1-pg. 1070 and which is placed before me by representative of the Party I, that:

> *"A direct recruit to a post, cannot be gainsaid cannot be reverted to a lower post. It is only a promotee who can be reverted from the promotion to the lower post from which he was promoted. This propositions are so elementary that the same are incapable of being disputed and have not been disputed".*

Relying upon the above decision, it can be safely be held that the demotion of the Party I from the post of Fabricator/Welder to the lower rank as Helper cannot be said to be legal and justified. I, therefore, answer the issue in negative.

24. *Issue No. 4:* Party II raised specific plea in para No. 2 of its written statement (Exb. 6) that there is no industrial dispute within the meaning of Section 2(k) of the Industrial Disputes Act, 1947 as on the date of making of the reference by the Government.

25. Representative appearing on behalf of the Party I argued that, the Party I at the relevant time was an employee of the Party II. There is relationship between these two parties as employee and employer. The dispute relates to employment of the Party I. Therefore, according to him, there is an industrial dispute within the meaning of Section 2(k) of the said Act, 1947.

26. Learned advocate of Party II by pointing out provision contained in Section 2(A) of the said Act, 1947, argued that, the dispute raised by the Party I is individual dispute which does not relate to discharge, dismissal, retrenchment or otherwise termination of services of the Party I. Therefore, according to him, there is no dispute as envisaged by Section 2(k) of the said Act, 1947.

27. Section 2(k) lays down that:

> *"Industrial dispute means any dispute or difference between employers and employers or between employers and workmen, or between workmen and workmen, which is connected with the employment or non-employment or the terms of employment or with the conditions of labour, of any person."*

Section 2(A) lays down that:

> *"Where any employer discharges, dismisses, retrenches or otherwise terminates the services of an individual workman, any dispute or difference between that workman and his employer connected with, or arising out of, such discharge, dismissal, retrenchment or termination shall be deemed to be and industrial dispute not withstanding that no other workman nor any union of workmen is a party to the dispute."*

28. Admittedly, the Party I was employee as Fabricator/Welder in establishment of the Party II at the time when he came to be demoted to the post of Helper. It follows that there is relationship of employee and employer between these two parties. The Party I has challenged his demotion to the lower rank which relates to his employment. These facts will certainly make provisions contained in Sec. 2(k) of the said Act, 1947 applicable to the present case.

29. As observed by the Hon'ble High Court of Bombay in case of *ANZ Grindlays bank* referred to above, Section 2-A was introduced by the legislature when it was found that some of the unions did not espouse the cause of individuals and therefore, such individual were left in lurch as their cause was not espoused by the Union, and therefore, grave prejudice and justice was done to individual workman. These amendments became necessary to meet the tyranny of some trade union, which discarded the individual workman. In such circumstances, a case of an individual workman was treated an industrial dispute by Section 2-A.

Section 2-A relates to discharge, dismissal, retrenchment or otherwise termination of services of an individual workman. There is no specific plea/pleading in written statement of Party II to support argument advanced by learned advocate of the Party II that there is neither dismissal nor retrenchment or otherwise termination of service of the Party I. Therefore, the dispute raised by the Party I and which is individual dispute will not come under provision of Sec. 2-A of the said Act, 1947. Only on this ground, I hold that the argument advanced by learned advocate of Party II with reference to provision of Sec. 2-A will have to be negatived.

30. It is true that if the letter whereunder punishment of demotion to lower rank is imposed upon the Party I, prima facie it appears that there is no direct termination of service of the Party I. By way of demotion to lower rank, the Party II has impliedly brought to an end service of the Party II as Fabricator/Welder which can be said to be the termination of his service from this post. It is otherwise termination of service of the Party I which in my view comes under provisions of Sec. 2-A also of the said Act, 1947. Argument advanced by learned advocate in this regard must fail. I hold that the dispute raised by the Party I is the "industrial dispute" within the meaning of Sec. 2(k) and also of Sec. 2-A of the said Act, 1947. I, therefore, answer the issue in affirmative.

31. *Issue No. 5:* It is proved that, action of the Party II in reverting the Party I from the post of Fabricator/ /Welder to the post of Helper is not legal and not justified. Therefore, the dispute which is referred to this Industrial Tribunal will have to be adjudicated accordingly.

So far relief claimed by the Party I in respect of back wages and continuity of services on the post of Fabricator/Welder is concerned, his representative argued that the Party I is not gainfully employed and therefore, the Party I is entitled to such relief under Section 11-A of the said Act, 1947. As against this, learned advocate of the Party II submitted that demotion to the post of lower rank was only for a period of six months. It was open for the Party I to join the service as Fabricator/Welder after the said period of six months is over. The Party I did not avail such option. Therefore, according to him, the Party I is not entitled to any of the reliefs as claimed by the Party I.

31. Once it is proved that, action of the management of Party II in reverting the Party I to the lower rank is not legal and not justified, the Party I is entitled for reinstatement in the original post to which he was directly recruited and from which he was demoted. To be more clear, he is entitled for reinstatement in the post of Fabricator/Welder.

32. The letter dated 22-1-2002 whereunder the Party I is demoted to the lower rank speaks that the demotion is for a period of six months. The Party II has conveniently avoided to make mention specifically in this letter that after the period of six months, the Party I will be posted to the original post of Fabricator/ /Welder. Without accepting the punishment by the Party I, and which is in the nature of demotion to the lower rank, it is doubtful as to whether he would have been allowed by the Party II to join the post of Fabricator/ /Welder after the period of six months. I am not convinced by argument of learned advocate of the Party II. There is no evidence on behalf of the Party II to hold that the Party I is gainfully employed since the time of his demotion to the lower rank. Considering all these circumstances and provisions contained in Sec. 11-A of the said Act, 1947, I conclude that the Party I is entitled to the reliefs as prayed for. My answer to this issue is in the affirmative.

As a result of finding given to the issue Nos. 1 to 5, I proceed to adjudicate the dispute under reference by passing order as follows:

ORDER

1. It is hereby held that, action of the management of M/s. Praveena Industries (Party II) in reverting Shri Shashikant Adel from the post of Fabricator/Welder to Helper w.e.f. 1-2-2002 is not legal and justified.
2. Action of the management of the Party II in reverting the Party I from the post of Fabricator/ /Welder to Helper w. e. f. 1-2-2002 is hereby set aside.
3. The Party I is entitled to reinstatement with full back wages and with continuity in the service.
4. No order as to costs.
5. Award be submitted to the Government of Goa as per provision contained in Section 15 of the Industrial Disputes Act, 1947.

Sd/-
(Dilip K. Gaikwad),
Presiding Officer,
Industrial Tribunal-
-cum-Labour Court-I.

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Notification

No. 28/18/2007-LAB/1113

The following award passed by the Industrial Tribunal of Goa, at Panaji-Goa, on 05-10-2007 in reference No. IT/ /96/2000 is hereby published as required by Section 17 of the Industrial Disputes Act, 1947 (Central Act 14 of 1947).

By order and in the name of the Governor of Goa.

Hanumant T. Toraskar, Under Secretary (Labour).

Porvorim, 12th November, 2005.

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IN THE INDUSTRIAL TRIBUNAL-CUM-LABOUR COURT-I AT PANAJI

(Before Dilip K. Gaikwad, Presiding Officer)

Case No. IT/96/2000

M/s. Margao Electronics,
May Fair Appartments,
Behind Canara Bank,
Margao, Goa. ... Workman/Party I

V/s

Ms. Maria Fernandes,
H. No. 225, Near Camilo Garage,
Borda, Margao, Goa. ... Employer/Party II

Workman/Party I is represented by Adv. Sudha Lad.
Employer/Party II is represented by Adv. P. J. Kamat.

AWARD

(Passed on this 5th day of October, 2007)

This is a reference under Section 10(1)(d) of the Industrial Disputes Act, 1947 (hereinafter in short referred to as the said Act, 1947).

1. Facts of present reference, stated in brief, are as follows:

The Government of Goa in exercise of powers conferred on it by Section 10(1) (d) of the said Act, 1947, under order dated 1-12-2000 has referred to this Industrial Tribunal following dispute for adjudication:

(i) Whether the action of the Employer, M/s. Margao Electronics, Margao-Goa in terminating the services of Miss Maria Fernandes, Telephone Operator-cum-Sales Girl, w.e.f. 9-11-1999 is legal and justified?

(ii) If not, to what relief the workperson is entitled?

2. In response to notices, both parties put their appearance in this Industrial Tribunal. The Party I presented her claim statement on 28-2-2001 at Exb. 4. It appears from the claim statement that the Party II is a sole proprietary concern dealing with business of sale and services of electronic items. Allan D'Costa is the proprietor. The Party I was employed as a Sales Girl/ Receptionist-cum-Telephone Operator in establishment of the Party II in the month of May, 1993 on monthly salary Rs. 500/-. Her last drawn salary was Rs. 2000/- per month in the year 1999. The Party II started harassing the Party I from first week of October, 1999 with intension that she should resign from the service. The Party II lodged F.I.R. on or about 9-11-1999 in Margao Police Station alleging that the Party I committed theft. On basis of the F.I.R. the police arrested the Party I on the very day that is on 9-11-1999. She came to be released on bail on the next day that is on 10-11-1999. The Party I immediately went to establishment of the Party II who in turn refused to allow her to join duty. The Party II did not terminate her service. Therefore, by presenting the claim statement she has prayed for direction to the Party II to allow her to join her duty on the same post and to pay to her salary at the rate of Rs. 2000/- per month from the month of October, 1999.

3. The Party II filed its written statement on 7-3-2001 at Exb. 5. It appears from written statement that the Party I is not a workman within the meaning of Section 2(s) of the said Act, 1947. Establishment of the Party II is covered by Goa, Daman and Diu Shops and Establishments Act, 1973. Therefore, this Industrial Tribunal has no jurisdiction to decide the reference. The Party I was employed in establishment of the Party II from the year 1993 purely on temporary basis. She was pursuing her studies in college. She was given employment in establishment of the Party II with a view to extend help for her education. She left the service of the Party II on or about 15-10-1999 due to her marriage and for better prospects. Thereafter, pursuant to her request she was re-employed in establishment of the Party II. She was never efficient in discharging her duties. Even then she was retained in the service. Certain goods were found missing from premises of the Party II. It was revealed that it was the Party I who had taken away the goods. Therefore, the police after making due inquiry arrested the Party I for offence of theft. The Party II lost confidence in her. Since after detection of the theft the Party I did not return to join her duties. She has left service. She lodged false complaint against proprietor of the Party II. Question of her reinstatement in the service does not arise. Therefore, the Party II has entreated for dismissal of the reference with cost.

4. The Party I filed rejoinder on 23-2-2001 at Exb. 6 and additional rejoinder on 5-7-2002 at Exb. 12. She has denied in the rejoinder and also in the additional rejoinder all contentions which are raised by the Party II in its written statement and which are adverse to her interest. She asserted that she is entitled to resume duties as of right. The Goa, Daman and Diu Shops and Establishments Act, 1973 does not disentitle her from raising Industrial Dispute against the Party II. She was employed in establishment of the Party II on regular basis from the year 1993. She got married in the year 1996. She was arrested by the police on basis of false F.I.R. lodged by the Party II. She is acquitted of the charge of theft by Judicial Magistrate First Class of Margao in criminal case No. 164/S/2000/I.

5. On basis of pleadings of both parties, the then learned Presiding Officer framed issues at Exb. 7 and additional issues at Exb. 13. The issues are recast by me at Exb. 26. The recast issued are as follows:—

1. Whether this Industrial Tribunal has jurisdiction to decide the reference?

2. Whether the Party I is a workman within the meaning of Section 2(s) of the Industrial Disputes Act, 1947?

3. Whether the Party II terminated services of the Party I?

4. Whether the termination of services of the Party I by the Party II is legal and justified?

5. Whether the Party I is entitled to reliefs as prayed for?

6. What Award?

6. My findings on the above issues are as follows:—

Issue No. 1. In affirmative.

Issue No. 2. In affirmative.

Issue No. 3. In negative.

Issue No. 4. The issue does not survive.

Issue No. 5. In negative.

Issue No. 6. As per final order.

REASONS

7. *Issue No. 1:* The Party II by way of amendment in written statement raised specific plea that this Industrial Tribunal has no jurisdiction to decide the present reference as the establishment of the Party II is covered by the Goa, Daman and Diu Shops and Establishments Act, 1973 (in short the said Act of 1973).

8. The Party II is carrying on business of Sales and Services of Electronic Goods. This fact is admitted by Thomas D'Costa in para No. 3 of his affidavit in evidence. He is sole proprietor of the Party II. His affidavit in evidence is at Exb. 17. Establishment of Party II is Industry as defined under Section 2(j) of the said Act, 1947. Further, it is not in dispute that, establishment of the Party II is registered under provisions of the said Act, 1973. In this connection reference of averments from para No. 2 of additional rejoinder (Exb. 12) submitted by the Party I can conveniently be made. The Party I instead of taking recourse of provisions contained in the said Act, 1973 raised a dispute under the said Act, 1947 for redressal of her grievances. Learned advocate of the Party I explained in para No. 7 of written notes of argument (Exb. 26) that registration of establishment under the said Act, 1973 does not debar Party I from raising dispute under the said Act, 1947, and therefore this Industrial Tribunal has jurisdiction to decide the reference.

9. Learned advocate of the Party II did not point out specific provision from the said Act, 1973 to show that the employee working in such establishment is prohibited from taking recourse under provisions of the said Act, 1947 for seeking redressal of his or her grievances. The Party I had raised the dispute against the Party II in respect of termination of her services before the Labour Commissioner. The Government of Goa is of the opinion that there exist Industrial Dispute between the Party I on one hand and the Party II on the other in the matter of termination of services of the Party I. Therefore, the Government of Goa has referred the dispute to this Industrial Tribunal for adjudication as stated in opening part of this judgement. Plea raised by the Party II in regard to jurisdiction of this Industrial Tribunal to decide the present reference is devoid of merits and misconceived and as such it must fail to ground. Rights accrued to the Party I under the said Act, 1947 are more favourable to her than those which she would be entitled under the said Act, 1973. In view of this matter, and since there is no specific bar provided in the said Act, 1973 for the employee working in such establishment from taking benefit of provisions contained in the said Act, 1947, it will have to be held that this Industrial Tribunal has jurisdiction to decide the present reference. I, therefore, answer the issue in affirmative.

10. *Issue No. 2:* Section 2(s) of the said Act, 1947, lays down that :

"workman means any person (including an apprentice employed in an industry to do any manual, unskilled, skilled, technical, operational, clerical or supervisory work for hire or reward, whether the terms of employment be express or implied, and for the purposes of any proceeding under this Act in relation to an industrial dispute includes any such person who has been dismissed, discharged or retrenched in connection with or as a consequence of that dispute or whose dismissal, discharge or retrenchment has led to that dispute but does not include any such person.

(i) who is subject to the Air Force Act, 1950 (45 of 1950), or the Army Act, 1950 (46 of 1950), or the Navy Act, 1957 (62 of 1957); or

(ii) who is employed in the police services or as an officer or other employee of a prison; or

(iii) who is employed mainly in a managerial or administrative capacity; or

(iv) who, being employed in a supervisory capacity, draws wages exceeding one thousand six hundred rupees per mensem or exercises, either by the nature of the duties attached to the office or by reason of the powers vested in him, functions mainly of a managerial nature.

The Party I does not come under any of the sub clauses (i), (iv) of Section 2(s) of the said Act, 1947. Admittedly, the Party I was employed in establishment of the Party II in the year 1993. Proprietor of the Party II conveniently avoided to disclose in his affidavit in evidence (Exb. 17) as to in which capacity Party I was employed in establishment of the Party II in the year 1993.

11. Evidence of the Party I and which is at Exb. 15 discloses that she was appointed as Receptionist, Sales Girl-cum-Typist in establishment of the Party II in the month of May, 1993 on monthly salary Rs. 500/-. Her salary came to be increased to Rs. 1,500/- per month and then to Rs. 2000/- per month. She worked in establishment of Party II till 9-11-1999. Proprietor of the Party II has stated in para No. 6 in his affidavit Exb. 17 that the Party I was employed as a Sales Girl from the year 1998.

12. There is no documentary evidence in the form of appointment letter to prove as to in which capacity the Party I was employed and what was the nature of her duties in establishment of the Party II. In short evidence of the Party I shows that she was employed as Receptionist/Sales Girl-cum-Typist from the month of May, 1993 while contents of affidavit sworn in by proprietor of the Party II (Exb. 17) show that the Party I was employed as a Sales Girl in the year 1998 in establishment of the Party II. There is documentary evidence in the form of certificate issued by proprietor of the Party II on 15-10-1999. The Certificate which is at Exb. W-2 speaks in clear term that the Party I was employed in establishment of the Party II as a Receptionist-cum-Typist from the year 1993. This

certificate is sufficient to make the position clear. Considering the nature of the post on which the Party I was employed in establishment of the Party II, it can safely be concluded that the Party I is a workman as defined under Section 2(s) of the said Act, 1947. I, therefore, answer the issue in affirmative.

13. *Issue No. 3:* It appears from evidence of the Party I that proprietor of the Party II was persistently insisting her to leave the service. He was causing harassment to her from the first week of October, 1999. He made false complaint to Margao Police Station on 9-11-1999 alleging that she committed theft of electronic goods. The police arrested her for offence of the theft. She came to be released on bail by court on 10-11-1999. She went to establishment of the Party II on the next day that is on 11-10-1999 but she was not allowed to join her duties. She is acquitted of the offence of theft, in criminal case by Judicial Magistrate first Class Margao. The Party II terminated her services with effect from 9-11-1999.

14. Affidavit in evidence (Exb. 17) filed by proprietor of the Party II shows that the Party I did not turn upto join her duties after she was released on bail. On the contrary, the Party I lodged case of defamation against him in the year 2000. She raised dispute for the first time under letter dated 29-6-2000 addressed to the Department of Labour and Employment by making grievance that she was not allowed to resume duties with effect from 9-11-1999. The Party II has lost confidence in the Party I and as such it was not desirable and in the interest of business of the Party II to retain the Party I in the service. It is the Party I who because of her own acts did not approach the Party II for job after she was released on bail on 10-11-1999.

15. From evidence led by the Party I as well as by the Party II it becomes apparent that according to the Party I, her services are terminated by the Party II, as against this, it is defence of the Party II that the Party I because of her involvement in offence of the theft of electronic goods have abandoned her service. Under this circumstance, question which is required to be decided as to whether there is termination of service of the Party I or as to whether there is abandonment of service by the Party I. Written notes of argument filed by learned advocate of the Party I (Exb. 26) are not helpful for decision of the question. Learned advocate of the Party II, besides his written notes of argument (Exb. 27), argued that the Party I was arrested by the police in connection with offence of theft of electronic goods belonging to the Party II. Because of such act the Party I did not turn up to join her duties in establishment of the Party II. She raised dispute for the first time after seven to eight months from the month of November, 1999 before the Labour Commissioner in respect of termination of her service. No explanation is forth-coming on behalf of the Party I as to why there was such gross delay in raising the dispute. Not only that, inspite of offer given by the Party II without prejudice to contentions raised in written statement, the Party I did not chose to join her duties in establishment of the Party II. All these circumstances, including conduct of the Party I are in his opinion pointer of fact that the Party I has abandoned the service. He relied upon decision given by the Hon'ble High Court of Bombay in case of Sonal Garments v/s Trimbak Shankar Karve, reported in 2002 III CLR 488 and which is referred by the Hon'ble High Court of Bombay in case of Raju Sankar Pojary, Petitioner v/s Chembur Warehouse Company and another, Respondent, reported in 2003 III CLR 890.

16. There was contention of employer in the Sonal Garments case that services of the workman were never terminated and yet the workman remained absent unauthorizedly and that the workman was always welcomed to join his duties. Considering facts of the said case the Hon'ble High Court held that the conduct of the workman was lending support to the version of the employer that the workman had abandoned the employment and that he never came to report for duty and that it was not a case of termination by the employer.

17. In the present case it has come in evidence of the Party I that she worked in establishment of the Party II till morning session of 9-11-1999. It is not in dispute that on basis of F.I.R. lodged by proprietor of the Party II police of Margao Police Station arrested the Party I on the very day that is on 9-11-1999. Further, it is also not in dispute that the court released her on bail on the next day that is on 10-11-1999. Under these circumstances, case made out by the Party I that the Party II terminated her services with effect from 9-11-1997 is not acceptable.

18. The Party I pointed out in her evidence that when she went to establishment of the Party II on 11-11-1999, the Party II did not allow her to join her duties. If it was so, it was expected on her part to make grievance in writing before proprietor of the Party II and to raise dispute before the Labour Commissioner within reasonable time. Evidence of the Party I does not show that she made such grievance before proprietor of the Party II. She raised dispute for the first time before the Labour Commissioner on 29-6-2000 as rightly pointed out by learned advocate of the Party II. No explanations is forth-coming on behalf of the Party I as to why there was such type of delay in raising the dispute before the Labour Commissioner.

19. The Party II by sending letter dated 4-8-2004 called upon the Party I to report for work within seven days from receipt of this letter. The offer was without prejudice to the contentions raised in written statement. Copy of this letter is at Exb. 5. This offer was during pendency of the present reference. The Party I by giving reply dated 5-8-2004 informed the Party II that offer given under letter dated 4-8-2004 does not spell out terms and conditions of service and amount of salary. The offer is contrary to the stand taken by the Party II in affidavit filed as evidence on its behalf. Mainly on these grounds she did not accept the offer. The reply is at Exb. E-6, colly. Again, the Party II sent letter on 9-8-2004

whereunder it has informed to the Party I terms and conditions of the service and protection of her last drawn salary Rs. 2000/- per month. Copy of the letter and postal acknowledgment receipt bearing signature of the Party I are at Exb. E-7, colly. The Party I did not give response to the letter dated 9-8-2004 sent by the Party II. When there was such offer by the Party II during pendency of this proceeding, and same is not accepted by the Party I even without prejudice to her rights and contentions, logical conclusion which can be drawn is that the Party I was not ready and willing to rejoin her duties in establishment of the Party II. This fact coupled with conduct of the Party I and her arrest in connection with offence of theft, though she subsequently acquitted, lends support to version of the Party II that the Party I had abandoned the employment, that she never came back to report for duty, and that there was never termination of service of the Party I. Therefore and relying upon decision given by the Hon'ble High Court of Bombay in Sonal Garments case (supra) I do not accept case made out by the Party I. I answer the issue in negative.

20. *Issue No. 4:* The Party I did not succeed in proving that the Party II terminated her service. On the contrary, it is proved that the Party I has abandoned the service. I, therefore, hold that the issue does not survive.

21. *Issue No. 5:* The Party I prayed for reinstatement in service with full back wages @ Rs. 2000/- p.m. As per provisions contained in Sec. 11-A, of the said Act, 1947, if the Labour Court, Industrial Tribunal or National Tribunal as the case may be, is satisfied that the order of discharge or dismissal was not justified, it may by its award set aside the order of discharge or dismissal and direct reinstatement of the workman on such terms and conditions, if any, as it thinks fit or give such other relief to the workman including the award of lesser punishment in lieu of discharge or dismissal as the circumstances of the case may require.

22. In the present case, it is already held that the Party I did not succeed in proving that the Party II terminated her service and therefore, question as to whether termination of her service is legal and justified does not survive. I, therefore, hold that she is not entitled to any reliefs as claimed by her.

23. The Hon'ble High Court of Bombay held in case of Raju Sankar Poojary, alluded Supra, that:

"an employee who has been repeatedly offered opportunity to join the services by the employer, when fails to take benefit of such an offer, cannot thereafter insist for the relief of reinstatement or for back wages."

24. Relying upon the above decision and in view of the fact that the Party I did not accept the offer given by the Party II under its letter dated 9-8-2004 to join service, I hold that she is not entitled to the prayer of reinstatement in service with full back wages. In view of this reason and the above discussion, I answer the issue in the negative.

As a result of findings given issue Nos. 3 to 5, I hold that the dispute as to whether the action of the Party II in terminating service of Party I w.e.f. 9-11-99 is legal and justified does not survive, and that, the Party I is not entitled to any of the reliefs. With this, I proceed to adjudicate the reference by passing order as follows:

ORDER

1. The dispute as to whether the action of the employer, M/s. Margao Electronics, Margao Goa (Party II), in terminating the services of Miss Maria Fernandes (Party I), Telephone Operator-cum-Sales Girl w.e.f. 9-11-1999 is legal and justified, does not survive.

2. The Party I/Workperson is not entitled to any relief.

3. No order as to costs.

4. The Award be submitted to the Government of Goa as per provisions contained in Section 15 of the Industrial Disputes Act, 1947.

Sd/-

(Dilip K. Gaikwad),
Presiding Officer,
Industrial Tribunal,
-cum-Labour Court-I.

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